Petition

Office - Supreme Court, U.S.
FILED
MAR 17 1982
ALEXANDER L. STEVAS,
CLERK

81-1730

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANK A. HALL, et al.,
PETITIONERS,

v.

ALBERT BLAKE, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS X. BELLOTTI
Attorney General
LEE CARL BROMBERG
Special Assistant
Attorney General
BROMBERG, SUNSTEIN & MCGREGOR
31 Milk Street
Boston, Massachusetts 02109
(617) 426-6464

Blanchard Press, Inc., Boston, Mass.—Law Printers

I

QUESTIONS PRESENTED

1. Where a jury in an action under 42 U.S.C. § 1983 has found that defendant state officials are not liable for violation of Eighth Amendment rights of plaintiff prisoners by reason of conditions in a maximum security prison, may an appellate court rule that equitable relief from these conditions is nonetheless available?

2. Must the conduct of plaintiff prisoners in sabotaging their living quarters be disregarded in determining whether conditions thus created denied them rights under the Eighth Amendment?

PARTIES

Petitioners are Frank A. Hall and Larry R. Meachum, former Commissioners of Correction in Massachusetts, and Frederick A. Butterworth, former Superintendent of Massachusetts Correctional Institution Walpole (hereinafter "M.C.I. Walpole").

Respondents are Albert Blake, David Aquafresca, Ralph Hamm, Gregory Davis, James Connors and Patrick Rahilly, all prisoners at M.C.I. Walpole, and a class consisting of all present inmates of M.C.I. Walpole and inmates of recent years (1975-1979).

TABLE OF CONTENTS

	Page
Questions Presented	I
Parties	I
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Decision of the Court of Appeals Is in Conflict With Decisions of This Court	6
A. Seventh Amendment Right to Jury Trial in Civil Matters	6
B. Elements of Liability Under Section 1983	9
II. The Ruling Below That Prisoner Misconduct Must Be Disregarded in Evaluating an Eighth Amendment Conditions Claim for Equitable Relief Presents a Substantial Issue of Great Importance to Prison Administration and to the Lower Federal Courts	11
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Baker v. *McCollan*, 443 U.S. 137 (1979) 9

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959) 6, 7, 8

Bell v. *Wolfish*, 411 U.S. 520 (1979) 12

Caputo v. *U.S. Lines Company*, 311 F.2d 413 (2d Cir. 1963) 9, 10

Curtis v. *Loether*, 415 U.S. 189 (1974) 8

Page

Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962)..... 7
Dolence v. *Flynn*, 628 F.2d 1280 (10th Cir. 1980)..... 8
Estelle v. *Gamble*, 429 U.S. 97 (1976)..... 9
Fitzgerald v. *United States Lines Co.*, 374 U.S. 16 (1963) 7
Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978)..... 9
Parratt v. *Taylor*, __ U.S. __, 101 S.Ct. 1908 (1981)..... 9
Polk County v. *Dodson*, __ U.S. __, 102 S.Ct. 445 (1981) 9
Rhodes v. *Chapman*, __ U.S. __, 101 S.Ct. 2392 (1981) 9, 13
Rizzo v. *Goode*, 423 U.S. 362 (1976)..... 9
Ross v. *Bernhard*, 396 U.S. 531 (1970)..... 7

Constitutional Provisions:

U.S. Constitution,
Amendment VII.....2, 6, 7, 8, 10
Amendment VIII.....2, 7, 8, 11, 12

Statutes:

28 U.S.C. §1254(1)..... 2
§§1331(a), 1343(3) and (4)..... 2
42 U.S.C. §1983.....i, 2, 6, 7, 8, 9, 10, 11, 12

Miscellaneous:

Turner, *When Prisoners Sue: A Study of Prisoners §1983 Suits in the Federal Courts*, 92 Harv.L.Rev. 610 (1979) 9
9 C. Wright & A. Miller, *Federal Practice & Procedure Civil* §2338 (1971)..... 7

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. -

FRANK A. HALL, et al.,
PETITIONERS,

v.

ALBERT BLAKE, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, Frank A. Hall, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on December 18, 1981.

Opinions Below

The opinion of the Court of Appeals dated December 18, 1981, not yet reported, appears as Appendix A hereto. The findings of fact and conclusions of law of the District Court, dated September 5, 1980, are unreported and appear as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was dated and entered on December 18, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Seventh Amendment to the United States Constitution, the Eighth Amendment to the United States Constitution, and the Civil Rights Act, 42 U.S.C. § 1983, each of which is set out, verbatim, in Appendix C hereto, p. A-27.

Statement of the Case

Respondents are inmates at M.C.I. Walpole who claimed below that sanitary conditions at M.C.I. Walpole violated their rights under the Eighth Amendment. They sued pursuant to 42 U.S.C. § 1983 and claimed jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1343(3) and (4). Named as defendants in this suit were petitioners Frank A. Hall, the former Commissioner of Correction, Larry R. Meachum, the Commissioner of Correction at the time of trial, and Frederick A. Butterworth, the former Superintendent of M.C.I. Walpole. The prisoners sought class action certification, $10,000,000.00 in damages, and extensive equitable relief. Shortly before trial, the Court below certified a class consisting of present M.C.I. Walpole inmates and inmates of recent years, for purposes of determining liability, but not for purposes of assessing damages. In the event of liability, individual damage claims were to be presented at a severed trial before a second jury. After a trial lasting four weeks, in which they heard testimony from twenty-six witnesses, including members of the plaintiff class,

all three defendants and numerous experts, the jury returned a verdict in favor of the three defendants. One year later, the district judge, in a ruling consistent with the jury verdict of no liability, denied plaintiffs' claims for injunctive relief. The prisoners appealed, claiming they were entitled to equitable relief notwithstanding the jury verdict. The Court of Appeals for the First Circuit held that equitable relief was not foreclosed by the jury verdict, and that the trial court was not permitted to consider the conduct of prisoners in determining whether an Eighth Amendment violation was present.

The evidence at trial showed that M.C.I. Walpole is a large maximum security facility opened in 1955 with a capacity for 666 inmates, and an average inmate population of approximately 600 at the time of trial. Walpole has 13 cell blocks plus two small cell areas, the New Man Section and the infirmary. Each inmate has his own cell, fully furnished with plumbing, bedding, clothing and articles for personal maintenance and for cleaning. Of the 13 cell blocks, four (blocks A1-A4) house medium security inmates, two (blocks B6 and B7) house recent arrivals awaiting classification, two (blocks A6 and B9) house protective custody inmates, four (blocks B1-B4) house maximum security inmates, and one (block 10) houses inmates whom the administration regards as the most disruptive, violent and difficult to control. The evidence concerning sanitation problems focused upon the maximum security blocks, blocks B1, B2, B3 and B4, and block 10. There was also evidence concerning sanitation in the food service area. In addition to a kitchen, food storage area, dining hall and inmate canteen, Walpole also has outdoor recreation yards, a gymnasium, indoor recreation rooms, and places for program activities. A law library and regular library are provided. The prison also contains visiting rooms, an avocation area, a laundry, a barbershop, shop and industrial areas, an auditorium and chapels. There are administrative offices and security facilities. Walpole has its own power plant and maintenance facilities.

The evidence showed that inmates in all parts of M.C.I. Walpole are provided with a) a high quality, nutritous diet; b) adequate shelter including heat, light and ventilation; c) a fully furnished private cell; d) excellent medical care; e) a full range of institutional clothes, bedding supplies, laundry services, personal hygiene supplies and cleaning supplies; f) a sound classification system which permits them to move to lower custody status where appropriate; g) sound security procedures which restrict the movement of the more disruptive, violent inmates to protect the personal safety of all members of the prison community; h) regular indoor and outdoor exercise; i) a full range of visiting, correspondence, telephone and personal property privileges; j) ready access to attorneys and a law library; k) religious counseling and services; l) a wide array of programs, activities and avocational opportunities; and m) job opportunities for large numbers of men.

In substance the evidence showed that M.C.I. Walpole has varying levels of custody, that freedom of movement and degree of privileges depend upon the level of custody, and that inmates are transferred from one custody level to another by the classification system on the basis of their record and behavior. The evidence showed that most of M.C.I. Walpole is maintained in a relatively clean and sanitary condition and that heavy reliance is placed upon inmate janitorial crews. The evidence also showed that some blocks had repeated sanitary problems because the inmate residents threw trash, debris, food and excrement on the walls and floors, refused to perform clean-up tasks and obstructed efforts to keep their own living quarters clean. The evidence also showed that prison officials made daily efforts to control the sanitary problems created by the inmates, by imposing appropriate disciplinary measures, by transferring out trouble makers, by encouraging the inmates to maintain the cleanliness of their blocks, and by engaging in periodic thorough cleaning of areas that had developed severe sanitation problems.

On appeal, the Court of Appeals for the First Circuit held that the jury verdict of no liability did not preclude equitable relief, in the following analysis:

> "Under these instructions, which have not been appealed, the jury could have made three findings in reaching its verdict: (1) that there were no constitutional violations; (2) if there were unconstitutional conditions, they were not caused by the deliberate or reckless conduct of the defendants; and (3) if there were unconstitutional violations, they were caused or substantially caused by the plaintiffs themselves. The jury could, of course, have reached all three conclusions. But the general verdict of no liability precludes further analysis. The district judge was not bound by the jury verdict in determining whether equitable relief should issue because there was no way to determine what common issues were decided by the jury."

[Footnote omitted.] (p. A-3, *infra*).

In reviewing the findings of fact and conclusions of law issued by the District Court judge a year after the jury verdict, the Court of Appeals ruled that "there was sufficient evidence" for the District Court's finding that conditions did not transgress constitutional requirements. However, the Court of Appeals expressed concern that the District Court "might have premised its ruling that the cell block conditions did not amount to cruel and unusual punishment on the fact that the prisoners caused or contributed to cause the conditions themselves." The Court of Appeals then went on to hold:

> "Although we would agree that in an action for damages the conduct of the plaintiffs-prisoners might bar them from recovering, we do not think that, under the facts here, the conduct of the prisoners was a factor to be considered in determining whether the cell block conditions amounted to cruel and unusual punishment."

The Court of Appeals ordered a remand for an assessment by the District Court of whether its denial of equitable relief with respect to conditions in the blocks was independent of any consideration of conduct by the plaintiffs-prisoners. The Court of Appeals also remanded to the District Court for reconsideration of its denial of equitable relief with respect to the housing of prisoners in the New Man's Section.

Reasons for Granting the Writ

I. The Decision of the Court of Appeals Is in Conflict With Decisions of this Court.

The ruling by the Court of Appeals that "the general verdict of no liability precludes further analysis" and that equitable relief was not foreclosed "because there was no way to determine what common issues were decided by the jury" is squarely in conflict with two lines of cases decided by this Court on principles of great public importance. On the one hand, dismissal of the jury verdict by the Court below clashes with this Court's rulings on the dimensions of the Seventh Amendment right to jury trial in civil matters. On the other hand, the Court of Appeals' finding of equitable liability notwithstanding the jury determination of no liability conflicts with the decisions of this Court establishing principles for determination of liability in actions under 42 U.S.C. § 1983.

A. *Seventh Amendment Right to Jury Trial in Civil Matters.*

This Court's landmark decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), made it clear that in a case involving both legal and equitable claims, the legal claims had to be tried first to a jury in order to preserve the rights of the parties to a jury trial under the Seventh Amendment. Subse-

quent cases have stressed the policy of the Seventh Amendment favoring jury determination of common issues. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Ross* v. *Bernhard*, 396 U.S. 531 (1970); *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963). As a leading commentator has put it: "The controlling principle of the *Beacon Theatres* case is the desire to protect jury determination of common issues." 9 C. Wright & A. Miller, *Federal Practice & Procedure Civil* § 2338, at 136 (1971).

In the instant litigation plaintiffs pressed their claim under 42 U.S.C. § 1983 for both legal and equitable relief on the ground that their rights under the Eighth Amendment had been violated. The factual issues relevant to a finding of liability under § 1983 are identical, irrespective of whether legal or equitable relief is sought. Here the evidence presented with respect to legal and equitable relief was taken simultaneously by the Court and jury. 42 U.S.C. § 1983 reads:

> "*Every person who*, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, *subjects, or causes to be subjected, any citizen* of the United States *or other persons* within the jurisdiction thereof *to the deprivation of any rights*, privileges or immunities *secured by the Constitution* and laws, *shall be liable to the person injured in an action of law, suit in equity*, or other proper proceeding for redress." (Emphasis added.)

It is plain that the plaintiffs must prove the same elements to establish a right to either legal or equitable relief under this statute. It is equally clear that the sweeping jury verdict in favor of all defendants established that the plaintiffs had not proved deprivation by defendants and hence precluded any grant of equitable relief.

In its carefully worded charge to the jury, which plaintiffs did not challenge on appeal, the District Court said that in order to recover, plaintiffs had to prove a deprivation of Eighth Amendment rights by one of the defendants. The deprivation had to be the result of deliberate conduct or the reckless failure to act. The jury was further instructed that they had to find a causal relation between the conduct and a deprivation of constitutional right. In that connection, the jury was instructed that if plaintiffs had deliberately created or substantially contributed to the conditions alleged to be unconstitutional, they could not recover.

Under this instruction, the jury verdict for the defendants constitutes a determination that (a) conditions at M.C.I. Walpole do not fall below the constitutional standard, or (b) whatever the conditions, defendants did not cause them, or (c) both. Hence even if the verdict is interpreted at its narrowest, the jury determined that there had been no deprivation of rights caused by defendants. Since a deprivation by defendants is an essential element to a claim for any kind of relief under the statute including equitable relief, and since the Court was bound by the jury determination of common issues, the Court was required to deny equitable relief.

The ruling by the Court of Appeals that equitable relief was available notwithstanding the jury's verdict deprived defendants of the jury determination in their favor on the basic § 1983 claim in derogation of their rights under the Seventh Amendment, and in conflict with the principles established by this Court in *Beacon Theatres* and its progeny. The ruling by the Court of Appeals directly conflicts with this Court's holding that a defendant's right to jury trial in an action under a federal civil rights statute must be preserved. *Curtis* v. *Loether*, 415 U.S. 189 (1974). The ruling below is also in conflict with decisions in other circuits which have recognized the clear right to a jury trial in § 1983 cases, *Dolence* v. *Flynn*, 628 F.2d 1280 (10th Cir. 1980), and that a trial court in assessing

equitable relief is bound by a jury's general verdict determining common issues. *Caputo* v. *U.S. Lines Company*, 311 F.2d 413 (2d Cir. 1963). This Court should grant certiorari to resolve these conflicts.

The importance of the jury trial issue in the administration and enforcement of prisoner § 1983 cases also weighs in favor of granting certiorari. Thousands of claims under § 1983 are filed each year by prisoners. *See* Turner, *When Prisoners Sue: A Study of Prisoners § 1983 Suits in the Federal Courts*, 92 Harv.L.Rev. 610 (1979). And "[t]here are over 8,000 pending cases filed by inmates challenging prison conditions." *Rhodes* v. *Chapman*, __ U.S. __, 101 S.Ct. 2392, 2402, n.2 (1981) (Brennan, J., concurring). Clarification of the jury's role in prisoner § 1983 suits challenging prison conditions would greatly facilitate the handling of these cases in the lower courts.

B. *Elements of Liability Under Section 1983.*

In recent decisions this Court has stressed the principle that liability in a § 1983 case is established only where plaintiff proves that deprivation of his federally protected rights was caused by conduct of a defendant acting under color of state law. *Polk County* v. *Dodson*, __ U.S. __, 102 S.Ct. 445 (1981); *Parratt* v. *Taylor*, __ U.S. __, 101 S.Ct. 1908 (1981); *Baker* v. *McCollan*, 443 U.S. 137, 142 (1979); *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 691 (1978); *Rizzo* v. *Goode*, 423 U.S. 362, 370-77 (1976). Where violation of the Eighth Amendment is alleged, more than mere negligence must be proven to establish the liability of defendant state officials. *Estelle* v. *Gamble*, 429 U.S. 97 (1976). Similarly, where state prisoners complain about conditions of confinement, the requisite link between alleged deprivations and conduct by the state officials must be established before plaintiffs may prevail. *Rhodes* v. *Chapman*, __ U.S. __, 101 S.Ct. 2392 (1981).

The ruling by the Court of Appeals below conflicts with the principles for establishing liability under § 1983 announced in the decisions of this Court, since it held that equitable relief was available notwithstanding the jury's finding of an insufficient nexus between alleged deprivations and actions by the defendant state officials.

The ruling by the Court below that "the general verdict of no liability precludes further analysis" (p. A. 3, *infra*) is simply erroneous, and also in conflict with this Court's cases establishing the deference due to jury determinations consistent with the Seventh Amendment, as discussed in Part I.A., *supra*. An examination of the record will disclose "what issues were concluded by the general verdict of the jury." *Caputo* v. *U.S. Lines Company, supra*, 311 F.2d at 416. Here, under the jury instructions below, the jury verdict exonerated the defendants of liability under § 1983. Even read at its narrowest, the general verdict determined that, because the contributory misconduct of the plaintiff class was substantial, defendants could not be held liable for a deprivation of plaintiffs' constitutional rights. The language of § 1983 itself and the decisions of this Court interpreting the statute mandate proof by plaintiff that claimed deprivations be caused by defendant's conduct. The jury verdict in favor of the defendants resolved that issue against plaintiffs below and hence extinguished their § 1983 claim to equitable relief as well as to damages. By permitting equitable relief notwithstanding the absence of a sufficient nexus between the alleged deprivations and defendants' conduct, the Court of Appeals came squarely into conflict with the principles announced by this Court in the above cases for establishing liability in a claim under § 1983. Certiorari should be granted to resolve the conflict.

II. The Ruling Below That Prisoner Misconduct Must Be Disregarded in Evaluating an Eighth Amendment Conditions Claim for Equitable Relief Presents a Substantial Issue of Great Importance to Prison Administration and to the Lower Federal Courts.

The Court of Appeals squarely held that the conduct of the plaintiff prisoners in creating unsanitary conditions in their cell blocks could not be considered in evaluating whether a violation of the Eighth Amendment had been made out by reason of such conditions. See pp. A-9–A-12, *infra*. Petitioners submit that this ruling is both wrong and of great importance to prison administration and to the lower federal courts.

The ruling by the Court of Appeals is inconsistent with the doctrine applicable throughout tort law that contributory misbehavior by the plaintiff is relevant to liability. At the least, the plaintiff's behavior has a bearing on the ultimate question whether the causal connection between the defendant's act and the plaintiff's injury is sufficiently close to justify liability. The decisions of this Court cited in Point I.B., *supra*, make it clear that liability under § 1983 is similarly dependent upon showing a sufficient nexus between the alleged deprivation and conduct by the defendants. Plaintiffs' behavior is almost inevitably relevant to the determination of defendants' liability, and to rule that it may not be considered, as the Court of Appeals did below, is clearly erroneous. The evidence at the trial below which persuaded both the jury and the District Court judge, showed energetic and continuous efforts by staff under the supervision of the defendant state officials to maintain sanitary conditions in the cell blocks, and periodic activity by some of the prisoners to sabotage these efforts, with the result that sanitary problems persistently reappeared in some cell blocks. On this evidence there was plainly insufficient nexus between the conduct and responsibilities of the defendant state officials and the conditions complained of to estab-

lish liability under § 1983 for violation of the Eighth Amendment. *Parratt* v. *Taylor*, __ U.S. __, 101 S.Ct. 1908 (1981); *Cf. Rizzo* v. *Goode*, 423 U.S. 362 (1976).

Moreover, the rule announced by the Court of Appeals—that prisoner conduct must be disregarded in evaluating the right to equitable relief in Eighth Amendment conditions suits—contradicts this Court's admonition that courts must defer to prison authorities "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 411 U.S. 520, 547 (1979). The record below makes it clear that actions taken and policies followed by the defendants were in response to problems created by the behavior of the plaintiff class. Where prison officials have done everything in their power to control prison conditions and sanitation problems persist due to the conduct of the prisoners, court intervention is inappropriate. On a theoretical plane, there is no basis for liability under § 1983 as discussed in Point I.B., *supra*. On a pragmatic level, it is inappropriate for a court to order the prison administrators to take action which they have already taken.

Factual distinctions are of course important. Where, for example, prisoners sabotage the heating system, the conduct of the prisoners, though relevant to the availability of equitable relief, is not conclusive. Prison officials must restore this essential requirement of adequate housing promptly. If they do so, prisoners will have no § 1983 claim. However, if prison officials fail to remedy the heating problem within a reasonable time, prisoners may have a valid § 1983 claim even though it was prisoner vandalism that first created the problem. Sanitation is also essential to adequate housing. However, it involves a more amorphous problem subject to daily variations. Continuing prisoner sabotage is highly relevant to a determination of whether court intervention is necessary or justified. Where poor sanitation is due to "negligent omissions of officials who

lack the resources or motivation to operate prisons within limits of decency," *Rhodes* v. *Chapman*, __ U.S. __, 101 S.Ct. 2392, 2407 (1981) (Brennan, J., concurring), then equitable relief will be appropriately afforded. However, where prison officials exhibit strong motivation and apply sufficient resources to address the problem, yet sanitation problems persist due to deliberate prisoner sabotage, the behavior of the prisoners is highly relevant to a determination whether court intervention is necessary or appropriate.

A ruling that prisoner behavior is immaterial to the availability of court-ordered changes in prison conditions is of great importance to prison administration. The prison environment, particularly at a maximum security institution, of necessity involves an uneasy equilibrium between the requirement for control by prison staff and the need for a modicum of self-respect on the part of prisoners. The product of these forces is a power struggle, sometimes subtle, sometimes violent. A rule of law that prisoner behavior is immaterial to conditions suits will detract from the ability of prison administrators to insist upon cooperation by the inmates, however grudging, in maintaining tolerable conditions within the prison. Particularly at the present time, when prison populations are experiencing an unprecedented upsurge nationwide, *Rhodes* v. *Chapman*, *supra*, 101 S.Ct. at 2404, it is important for prison officials and for all members of the prison community to have a clear ruling from this Court on whether any weight will be given to prisoner conduct in evaluating conditions claims. Since "[t]here are over 8,000 pending cases filed by inmates challenging prison conditions," *Id.*, 101 S.Ct. at 2402, n.2, resolution of this issue is also important for the guidance of the lower federal courts.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General

LEE CARL BROMBERG
Special Assistant
Attorney General

BROMBERG, SUNSTEIN & MCGREGOR
31 Milk Street
Boston, Massachusetts 02109
(617) 426-6464

Dated: Boston, Massachusetts
March 17, 1982

Appendix

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 80-1792

ALBERT BLAKE, ET AL.,
PLAINTIFFS-APPELLANTS,
v.
FRANK A. HALL, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before
ALDRICH, CAMPBELL and BOWNES, *Circuit Judges*.

Judith A. Stalus, with whom *Norman Zalkind* and *Michael Avery* were on brief, for appellants.
Lee Carl Bromberg, Special Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Bromberg, Sunstein & McGregor* were on brief, for appellees.

December 18, 1981

BOWNES, *Circuit Judge*. Plaintiffs-appellants, inmates at the Massachusetts Correctional Institution Walpole (Walpole), brought a 42 U.S.C. § 1983 civil rights class action alleging that the conditions of their confinement amounted to cruel and unusual punishment. Declaratory and injunctive relief, as well as damages, were sought. Named as defendants were Frank A. Hall, former Commissioner of Correction, Larry R. Meachum, Commissioner of Correction at the time of trial,

and Frederick A. Butterworth, former Superintendent of Walpole. The damages case was tried to a jury which returned a verdict in favor of the three defendants.

The judge, a year after the verdict, issued a written opinion finding no constitutional violations and denying injunctive relief.

The main issue on appeal is whether the evidence of conditions at Walpole compelled a finding of cruel and unusual punishment either as to the entire institution or as to certain sections of it. The attack on the jury verdict is confined solely to the claim that plaintiffs' motion for judgment notwithstanding the verdict should have been granted. There is one related issue: whether the court should have amended its findings of fact and judgment and received new evidence in regard to a section of Walpole (New Man's Section).

We start with defendants' contention that the seventh amendment required the district judge to accept as binding the findings of fact made by the jury in reaching its verdict. The landmark case in the joint law-equity trial area is *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). In *Beacon Theatres*, the Court stressed the importance of the jury as a fact-finding body and held that, although the complaint sought only declaratory and injunctive relief, because the counterclaim demanded a jury trial of the factual issues, the jury issues had to be tried first. The Court was concerned that if the equitable issues were decided first by the trial judge, the defendant's seventh amendment right to a full jury trial of the counterclaim might be foreclosed by the doctrine of collateral estoppel. "The controlling principle of the Beacon Theatres case is the desire to protect jury determination of common issues." 9 C. Wright & A. Miller, Fed. Prac. & Proc. Civil § 2338, at 136 (1971). The problem in this case is determining what issues were decided by the jury in reaching its verdict. The charge instructed the jury in effect as follows. In order to recover, plaintiffs had to prove a deprivation of a constitu-

tional right by one of the defendants. Such deprivation had to be the result of deliberate conduct or the reckless failure to act. The jury was also instructed that if plaintiff had deliberately created or substantially contributed to causing the unsanitary conditions (garbage and filth, including human excrement on the floors and walls of the cell blocks), which they alleged were unconstitutional, they could not recover.

Under these instructions, which have not been appealed, the jury could have made three findings in reaching its verdict: (1) that there were no constitutional violations; (2) if there were unconstitutional conditions, they were not caused by the deliberate or reckless conduct of the defendants; and (3) if there were unconstitutional violations, they were caused or substantially caused by the plaintiffs themselves. The jury could, of course, have reached all three conclusions. But the general verdict of no liability precludes further analysis. The district judge was not bound by the jury verdict in determining whether equitable relief should issue because there was no way to determine what common issues were decided by the jury.[1]

We turn now to the main issue of whether conditions at Walpole compelled a finding of cruel and unusual punishment either as to the institution or sections of it. We review the facts and all the reasonable inferences to be drawn from them in the light most favorable to the defendants. *Hawkins* v. *Hall*, 644 F.2d 914, 915 (1st Cir. 1981). And, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness." Fed.R.Civ.P. 52(a).

Even in a prison setting, there are no rigid standards as to what does and does not amount to cruel and unusual punishment. Penal measures must be evaluated against "broad and idealistic concepts of dignity, civilized standards, humanity and decency" and "the evolving standards of decency that

[1] The opinion of the district judge does not suggest in any way that he felt bound by the jury verdict.

mark the progress of a maturing society." *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976), quoting *Jackson* v. *Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), and *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). In *Hutto* v. *Finney*, 437 U.S. 678, 685 (1977), the Supreme Court held that the punishment must not be grossly disproportionate to the offense and must not offend society's evolving sense of decency. This circuit has applied these two benchmarks for determining whether prison conditions violated the eighth amendment in *Hawkins* v. *Hall*, 644 F.2d at 917, and *Nadeau* v. *Helgemoe*, 561 F.2d 411, 413 (1st Cir. 1977).

The gravamen of the complaint is that the unsanitary and filthy conditions of Walpole compounded by inadequate lighting, heating and ventilation, amount to cruel and unusual punishment. Plaintiffs' evidence depicted Walpole as a charnel house out of the middle ages. Although defendants did not suggest that the prison was a rose garden, their evidence was that, while there was definite room for improvement, conditions did not violate eighth amendment standards.

Before summarizing the evidence, it is necessary to describe the prison. Walpole is not an old facility compared to many state prisons. It was opened in 1955 with a capacity for 666 inmates. At the time of trial, there were 580 prisoners; the average population is about 600.

There are thirteen cell blocks plus two small cell areas, the New Man's Section and the infirmary.[2] Each inmate has his own cell which is furnished with a bed, bedding, mattress, table, chair, a sink with hot and cold running water and a toilet. The prisoners are classified into different groups and each group is assigned to separate cell block areas.

Blocks A1-A4 house medium-security inmates. There are a total of 261 cells. Blocks A1, A2 and A3 are each rectangular with the cells located along two exterior walls. There are three tiers of cells consisting of twelve cells to a tier on each side of

[2] The infirmary cell block is not a factor in the case.

the central area of the block which is known as the "flats." The cells on the second and third tiers open onto a catwalk with stairways going down to the "flats." Each cell has a window in the exterior wall looking outside onto the prison grounds. A solid steel door with a small observation window opens to the central area of the block. Block A4 has three tiers of fifteen cells, each along an interior wall, facing a blank wall with an officer's observation gallery. These cells have three solid sides with a grille door facing onto the flats. Ventilation is supplied by a combination heat and air circulation system.

Cell Blocks B6 and B7 are occupied by those inmates who have recently arrived at Walpole and have not yet been classified. Each block contains forty-five cells and is identical to Block A4.

Maximum security inmates are housed in Blocks B1 — B4. Each block has forty-five cells arranged in three fifteen-cell tiers identical in layout and construction to Blocks A4, B6 and B7.

Block 10 contains those inmates whom the administration believes to be the most disruptive, violent and difficult to control. It consists of four tiers of fifteen cells each, two tiers back-to-back on the ground level, and two tiers above them. The upper tier cells have three solid walls and a grille door opening onto the central corridor. The lower level cells have a solid steel door with an observation window that closes over the grille door.

Protective custody inmates, those who fear physical harm from other prisoners, are housed in Blocks A6 and B9. Block A6 is identical to Blocks B1, B4, B6, B7 and A.4. Block B9 has an upper and lower level. The lower level consists of three five-cell tiers. Each cell has three solid walls, a grille wall with a grille door in it facing onto the corridor. The upper level has two back-to-back tiers of ten cells each. Each cell has a grille door in a solid wall and a solid steel door that can be closed over the grille.

The New Man's section is an eight-cell unit located beneath the infirmary. It has no natural light or ventilation.

There are showers for each cell block.

Walpole also includes a kitchen, food storage area, dining hall and inmate canteen. There are outdoor recreation yards, a gymnasium, indoor recreation rooms and places for program activities. A law library and regular library are provided. The prison also contains visiting rooms, an avocation area, a laundry, a barbershop, shop and industrial areas, an auditorium and chapels. There are administrative offices and security facilities. Walpole has its own power plant and maintenance facilities.

We focus first on the sanitary conditions in the maximum security section of Walpole, Blocks B1 to B4 and Block 10, because they were the worst in the prison. The testimony of plaintiffs' witnesses can be summarized as follows. Many of the toilets in the cells had been broken and did not work. Sinks in a number of cells were plugged up and did not drain properly, and many of them were broken and had sharp edges. The floors and walls were caked with dirt, grime and human excrement. The floors were so covered with garbage and debris that it was difficult to walk on them. Because of leaks in the roof, after a rainstorm the floors became wet and slimy. Most of the plumbing fixtures in Block 10 were so old that corrosion and layers of paint made cleaning impossible. Many windows were broken and without screens. Because of poor ventilation and the way the heating system worked, inmates on the top levels were roasting while those on the ground level were cold. The showers were filthy and moldy and they stank. What shower curtains there were, were covered with slime and grime. Howard Wenslev, Director of Regional Operations for the State Department of Public Health, testified that these blocks were unfit for human habitation, as did two other expert witness called by plaintiffs, Wesley Eugene Profit and Joseph G. Cannon.

Defendants admitted that sanitation in the maximum security blocks was a continuing problem, but testified that they were doing their best to cope with it. The unsanitary conditions, according to defendants, were due mainly to openly defiant inmates who threw paper, food, garbage and their own excrement on the floors and walls. A system of inmate "runners" is used to keep the cell blocks clean. Four runners per cell block have the duty to remove trash and keep the floors, walls and shower facilities clean. Each inmate has the responsibility for keeping his own cell and is furnished the necessary materials to do so. This system has broken down from time to time in the maximum security blocks. When this happens and sanitary conditions become intolerable, a "lockup" is imposed and correction officers try to clean up. They have been impeded in their efforts to do so by inmates who throw excrement, food, and garbage at them. Block 10 has been a particularly difficult problem because of its volatile inmates. The runner system had to be abandoned some months prior to trial; since then, correction officers have done the daily cleaning. Sanitary conditions are dependent upon the defiance mood of the inmates and, at times, the upper two tiers of Block 10 were practically spotless. In 1978, Block 10 received a thorough cleaning and repainting. At the time of trial, the maximum security blocks were in the process of being scraped, thoroughly cleaned, and repainted. All occupied cells had plumbing in working order at the time of trial. Plumbing repairs are made as promptly as possible, usually within twenty-four hours. A capital outlay budget has been provided to upgrade the plumbing system.

The evidence relating to other sections of the prison was also conflicting. There was testimony of a rodent and cockroach infestation so severe as to pose a danger to health. This was countered by testimony that the problem was not any worse than that encountered in any large institution. Evidence of continued health code violations in the kitchen and eating area

was met by testimony that this was not unusual in a facility of this size and that no specific instances of disease, illness or accident due to code violations had occurred.

Plaintiffs' evidence as to conditions in the New Man's Section was, for the most part, uncontroverted. Its subterranean location results in a complete lack of natural light and ventilation. There was no mechanical ventilation. Water seeps through the walls and ceilings, and sewage backs up periodically. Plaintiffs' expert, the Director of Regional Operations for the Massachusetts Department of Public Health, testified that the New Man's Section was unfit for human habitation and could not be made fit. There is no opportunity for out-of-cell or outdoor exercise for the inmates. Defendants impliedly admitted to the existence of these conditions by testifying that use of this section is severely restricted, that it has been emptied from time to time, that a thirty-day limit has been put on confinement there, and that it is planned to close this section when the population of the prison has declined sufficiently.

Plaintiffs also claimed that the idleness of many prisoners not only contributed to unconstitutional conditions, but that idleness was deliberately forced on the Block 10 inmates as a form of punishment. Another claim of a constitutional violation was based on the undisputed fact that those housed in the lower tiers of Block 10 and the New Man's Section were not afforded the opportunity to exercise out of their cells or outdoors.

Defendants' evidence emphasized that Walpole as a whole is adequately operated. Inmates are provided with a nutritious diet, adequate heat, light and ventilation, an adequately equipped private cell, good medical care, personal hygienic and cleaning supplies, necessary clothing and bedding materials, regular indoor and outdoor exercise, regular visits, ready access to attorneys and a law library, religious counseling and services, hobby and vocational programs, and job opportunities for a good number of inmates.

The district court made specific findings on all of the claims made. It found that inmates were not denied the right to reasonable exercise, that there was not a policy of deliberate idleness forced upon inmates of Block 10 in order to punish them. It held that idleness "did not present a picture of constitutional violation." As to sanitary conditions, the court found that, although "they leave a great deal to be desired, that, however, they are not shocking or barbarous and do not transgress the Constitutional standard. The problems of which complaints were made were created by the plaintiff class, in large measure." After reciting the factors that it had taken into consideration, the court stated: "In summary, the plaintiffs have failed to establish by a fair preponderance of the evidence that the inmates at Walpole have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, in the blocks, in the New Man's Section, or by reason of conditions in the kitchen area. The conditions complained of were created by the plaintiffs' own conduct in the cell blocks." The court concluded: "The conditions of confinement of the inmates at Walpole are not barbarous to the extent that they offend society's evolving sense of decency. *Nadeau* v. *Helgemoe*, 561 F.2d 411 (1st Cir. 1977). The sanitation problem in the cell blocks was created by the plaintiffs themselves."

The thrice-repeated statement that the conditions in the cell blocks were created by the prisoners themselves raises a question as to what standard the court applied in finding that these conditions did not transgress constitutional requirements. We do not quarrel with the factual basis for the finding — there was sufficient evidence for it. But the place it is given in the opinion — each time after a finding of no constitutional violation — suggests that the court might have premised its ruling that the cell block conditions did not amount to cruel and unusual punishment on the fact that the prisoners caused or contributed to cause the conditions themselves. Although we would agree that in an action for damages the conduct of the

plaintiffs-prisoners might bar them from recovering, we do not think that, under the facts here, the conduct of the prisoners was a factor to be considered in determining whether the cell block conditions amounted to cruel and unusual punishment. There was no evidence from which it could be found that all of the inmates, or even a majority of them, were responsible for the conditions. We see no reason why well-behaved inmates should have to suffer cruel and unusual punishment because of the actions of some disruptive ones. Despite the district court's findings, the prison administration must bear the ultimate responsiblity for cell block conditions.[3] To rule otherwise would mean, in the final analysis, that the prison was being run by the inmates, not by those charged by law with its administration. We realize that prison administrators do not have an easy task, but dealing with violent and disruptive men without violating the cruel and unusual punishment proscription of the eighth amendment is their job. The Eighth Circuit put it well in *Wycoff* v. *Brewer*, 572 F.2d 1260, 1267 (8th Cir. 1978):

> It must be realized, however, that prison administrators are required to deal in a constitutional manner with convicts who are violent and unruly as well as with those whose conduct is exemplary or at least peaceful. And while prison officials must have some latitude in imposing conditions reasonably necessary to control a prisoner's behavior, the contributory fault of an inmate does not necessarily deprive him of his right to relief from deprivations of constitutional dimension.

We have been unable to find any case holding that equitable relief from unconstitutional living conditions should be denied because the conditions were created in whole or in part by

---

[3] The court did not comment directly on the testimony of Joseph G. Cannon, an expert with twenty-seven years' experience in state correctional work, including three years as Commissioner of Correction for the State of Kentucky, that the unsanitary conditions were due to lack of supervision by the administration.

some of the prisoners. Although the law in this area has not yet jelled, the cases point in the directon of the position we take. In *Ramos* v. *Lamm*, 639 F.2d 559, 569-70 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3743 (April 6, 1981), the court noted that one of the defenses of the prison officials was that the unsanitary conditions were due to an absolute refusal by the inmates to help keep the prison clean. The court, nevertheless, held the prison administration responsible for the trash, decayed food, and other material that routinely littered the corridors. In *Palmigiano* v. *Garrahy*, 443 F. Supp. 956, 963-64 (D. R.I. 1977), the district court placed primary responsibility for sanitation on the administration, although it acknowledged the inmates' role as well.

The contributing role of the inmates in creating unsanitary conditions was remarked upon in the extensive litigation concerning the Arkansas prison system. Although the prison officials did not raise it explicitly as a defense, the prisoners' role did not preclude the court from ordering relief. *See Holt* v. *Sarver*, 309 F. Supp. 362, 378, 384-85 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). In a later Arkansas case, the court, in finding that conditions had deteriorated rather than improved, observed that acts of vandalism and personal violence by the inmates were the result of overcrowding and other unconstitutional conditions. *Finney* v. *Hutto*, 410 F. Supp. 251, 276-77 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

An analogy may be made to the eighth amendment right to be reasonably protected from violence in prison. *See Gates* v. *Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974); *Woodhous* v. *Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (per curiam); *Martinez Rodriguez* v. *Jimenez*, 409 F. Supp. 582, 594 (D. P.R. 1976); *Pugh* v. *Locke*, 406 F. Supp. 318, 329-30 (N.D. Ala. 1976), *aff'd sub nom. Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd on other grounds sub nom. Alabama* v. *Pugh*,

438 U.S. 791 (1978). Such violence is clearly the "fault" of the prisoners, yet prison officials are constitutionally required to prevent it.

We do not mean to suggest that prison officials cannot require inmates to keep their cells and living space clean. This can be done by any combination of discipline and reward that is appropriate and does not violate the eighth amendment. What we hold is that the prison administration must see to it that unsanitary conditions do not continue unabated because the conditions were first caused by the inmates themselves. Cleanups must be conducted regularly, although they benefit those who made the mess as well as those who did not.[4]

Because it is not clear whether the finding that the prisoners created the cell block conditions prompted the ruling that there was no constitutional violation, we remand[5] to the district court to determine, without regard to the role of the prisoners, whether the conditions in any of the cell blocks amount to cruel and unusual punishment.

We also must question the court's conclusion that conditions in the New Man's Section did not amount to cruel and unusual punishment. It is difficult for us to understand why confining men in a dungeon even with a thirty-day limit under the conditions described, and which were essentially uncontroverted,

---

[4] This is not to say that identifiable inmates who create unconstitutional conditions, or thwart the efforts of prison administrators to keep prision conditions up to constitutional standards, are necessarily entitled to relief from the very conditions they themselves create. Depending on the circumstances, such individuals might well be estopped from relief against self-imposed conditions. The administrators, however, owe a duty to the other inmates to see that the conditions in which they live are up to standard, and if constitutional conditions cannot be maintained in one location because of the misconduct of certain unruly inmates, then those inmates who are not responsible must be moved to a location where their rights can be secured, or the unruly inmates must themselves be relocated. This is much the same as the duty owed to protect inmates from the violence of other prisoners.

[5] *See Nadeau* v. *Helgemoe*, 561 F.2d 411, 418-19 (1st Cir. 1977), for an example of another prison case remand due to ambiguities in the district court's rulings.

does not offend society's evolving sense of decency. *See Hawkins* v. *Hall*, 644 F.2d at 917-18. The New Man's Section is reminiscent of the middle ages, not a penal institution opened in 1955. We think the court's finding must have been influenced by testimony of the defendants that they intended to close the New Man's Section. On page five of its opinion, the court ended its description of this section by stating: "It is intended that this section be closed." The court also found: "So far as the New Man's Section is concerned, no man may presently be placed there against his will." It is true that Thomas McLaughlin, Associate Deputy Superintendent, testified that the New Man's Section was the safest place in the prison and that some inmates went there for protection, but we are hard put to find any evidence that the section was limited to volunteers. Moreover, in finding that no man may be placed in the New Man's Section against his will, the court overlooked the realities of prison life at Walpole. It was referring to prisoners who, because of the fear that if they were kept in the general prison population they would be physically assaulted or killed, had asked for protective custody. Given the Hobson's choice of the New Man's Section or the risk of death at the hands of other inmates, they naturally chose to stay alive. In this connection, we note the uncontradicted testimony of Wesley Profit, a clinical psychologist with special emphasis on delinquency in crime. Profit ran a progam at Walpole from 1976 to 1978 on race relations for the maximum-security inmates. He testified *inter alia* that Walpole has a national reputation for being one of the most violent prisons in the country with a significant number of inmate murders.

After the findings and judgment were handed down, plaintiffs moved to amend those portions that had to do with the New Man's Section, asserting that the defendants' plan to close the New Man's Section was not carried out in the year that passed between the trial and the findings, and that defendants have continued to use the New Man's Section for inmates who would otherwise be held in Block 10. Plaintiffs also moved to

strike that portion of the findings in which the court found that "no man may presently be placed there [New Man's Section] against his will." If defendants changed their intention to close the New Man's Section and also its use between the date of the jury verdict and when the findings were issued, the district court's determination of whether there was a violation of the eighth amendment may be affected. We think that plaintiffs should be given an opportunity to prove their allegations that defendants no longer intend to close the New Man's Section and that its use changed between the end of the trial and the date the court's findings were issued. If the court finds that defendants intend to continue to use the New Man's Section, then it should determine whether the conditions prevailing at the time of the new hearing constitute cruel and unusual punishment.

We have read the entire record carefully and considering our standard of review, the clear error rule, and the discretion a trial judge has in making credibility determinations, we uphold all findings except those as to the cell block conditions and the New Man's Section.

We also affirm the district court's denial of plaintiffs' motion for judgment notwithstanding the verdict.

Affirmed in part and remanded for further proceedings consistent herewith.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 78-3051-MC

ALBERT BLAKE, ET AL.,

v.

FRANK A. HALL, ET AL.,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

September 5, 1980

McNaught, *D.J.*

This is a civil rights class action for declaratory and injunctive relief "from the conditions of incarceration" at the Massachusetts Correctional Institution at Walpole, brought by inmates on behalf of "all past, present and future inmates" there. The law action arising out of the same subject matter, seeking damages under 42 U.S.C. § 1983, was tried concurrently to a jury.

Plaintiffs claimed in their opening statement a violation of their constitutional rights as a result of "neglect" and/or bad faith and/or with specific intent. Some sections of Walpole, it was claimed, were filled with garbage — food piled high — walls caked with filth — institution filled with rodents — insects — lack of screens — toilets flooding — water leaks — unbearably hot in the summer and cold in the winter — inadequate garbage removal in Block 10, etc. There were claims of a "subterranean dungeon-like area" (the "New Man's section"). Plaintiffs claimed that the defendant state officials subjected Walpole inmates to conditions of confinement so oppressive, unsanitary, unhealthy, degrading and debilitating as to

violate their Constitutional right to be free from cruel and unusual punishments. Defendants conceded in their opening statement that "Walpole" is not a pleasant place; that while unsanitary conditions might have existed there, their description by the plaintiffs was exaggerated; that effort was made, with a large number of facilities, to take care of the great number of needs of approximately 600-650 people; that effort was exerted to provide improvements in education and work skills for the prisoners; that order had to be maintained in a relatively small place while dealing with the most violent of criminals in the correctional system; that the inmates themselves created the conditions of which they complain, by throwing food, excrement, and garbage; that the inmates refused to cooperate, throwing food, canned goods, and trash barrels from tiers. Defendants contended that it was the inmates who broke the sinks, toilets, and threw them into the cellblocks; and that when corrections officers attempted to clean the place up for the benefit of the inmates, urine, excrement and garbage were thrown at them.

The court (and jury) was provided with a color coded diagram of a schematic nature, of MCI Walpole. This institution is the maximum security prison for the Commonwealth of Massachusetts, with a capacity of 666 inmates. At the time of trial the population numbered slightly less than 580. It was opened in 1955, replacing the Charlestown State Prison. The schematic diagram reveals that as one faces the lobby and administrative section in the center of the prison, the minimum security blocks, A1, A2 and A3, are to the left, off a main corridor. Also to the left, across the main corridor from A1, is Block 10. Block B10 is at the far end of the minimum security section, and it is structurally different from both minimum and maximum blocks. It is used for the segregation of "difficult" inmates. To the right of the administrative area are the maximum security blocks, B1, 2, 3, 4, 6 and 7. Blocks A4 and A6, although they are minimum security blocks, are also

located in the maximum security end. Finally, to the extreme right is maximum security Block 9, where approximately 75 men are kept in protective custody.

Block 10 contains 60 individual rooms. The minimum security cellblocks near it each contain 72 cells. The maximum end cellblocks (8) have 45 cells per block. Each cell in the minimum end has a window. In the maximum end, cells do not have windows. Natural light is available only from a ceiling-level skylight. In the administrative portion of the prison are the control room, deputies' office, visiting rooms, law library, chapel, social services, hospital services, day rooms, library, computer program room, education and classroom area, an auditorium, a dining room, office area, kitchen, staff dining room, receiving area and storage area.

The "New Man's section" is a small unit beneath the prison infirmary. It is now used primarily for protective custody inmates. New men actually are held in Blocks B6 and B7 in the maximum security area.

Maximum Security Blocks

Cellblocks B1 through B4, containing a total of 180 rooms, provided space for inmates posing the greatest risk of violent behavior. The construction of each cell (similarly to cells in Blocks A4, B6 and B7) shows three solid walls and a grille wall with a grille door facing the "flats". There are three tiers of 15 cells each along one long wall, facing a blank wall with an officers' observation gallery. Ventilation is provided only by a mechanical heat and air circulation system. Light is provided by the bank of skylights running across the top of the blocks. Each cell has a toilet, sink with hot and cold running water, table and chair, bed and mattress. Shower facilities are available on each tier. The inmates there are not permitted to work, except that four inmates in each block act as runners cleaning the blocks. The men have personal property privileges and may maintain in their cells televisions, radios, personal clothing, and the like.

There are no organized recreational programs. The inmates have limited indoor recreational facilities in addition to daily periods in the B section, outdoor recreation yard. If an inmate in a maximum block wishes to participate in the industries program or in jobs requiring access to less secure parts of the institution, the inmate must first earn his way to placement in the A section. Prior to November, 1978, educational programs were instituted including a limited number of high school and college courses, black studies, a Spanish course and tutorials, religious groups, art workshops, and a race relations seminar.

Protective Custody Blocks

Protective custody is provided for prisoners who are "unsafe" in the general prison population for any of a number of reasons. Protective custody inmates are housed in Block A6 (described as medium security) and in Block 9. Occasionally, an eight-cell unit, located below the infirmary, known as the "New Man's section", has been used. A6 houses 45 men individually; Block 9 houses 30. The "New Man's section" will hold up to eight. In A6, the cells are furnished similarly to those in the maximum security block. The inmates, as do those in maximum security, receive institutional bedclothes, laundry service and cleaning supplies. They are fed in the block on tables set up in the flats. Ordinarily, these men are not permitted to work, except as runners. They have visiting privileges and may use the outdoor yard. The only programs available to the men in A6 and in Block B9 are a G.E.D. course and a tutorial. The fact of protective custody explains the enforced idleness, with the exception of the out-of-cell time for showers or outdoor exercises.

New Man's Section

As stated hereinbefore, this section is an eight-cell unit, located below the infirmary, without natural light or ventilation. It has been used from time to time for protective custody of inmates unable to live safely with their peers in either A6 or B9. A 30-day limit was imposed on stays in this section by

order of the Commissioner of Corrections. It is intended that this section be closed.

Block 10

This block has two tiers back-to-back on an upper level and two tiers back-to-back on a lower level, for a total of 60 cells. Approximately 45 inmates are usually housed there. These are described as the most severely disruptive, violent inmates in the prison system. A prisoner is transferred there after engaging in assaultive or destructive behavior, to preserve order or security in the general population, and to protect the safety of other inmates and staff.

Each tier has a five-foot-wide corridor in front of the cells. Each cell on the upper level has three solid walls and a grille door facing the corridor. The lower cells also have a solid steel door which can be closed over the grille door. The solid steel door has an observation window in it. The cells are furnished similarly to other cells in the prison. Each inmate is entitled to clothing, bedclothes, laundry service, hygiene items and cleaning supplies. In March of 1979, inmates' television sets were confiscated. Radios and televisions are permitted on the upper level. Inmates in the upper tiers are entitled to one hour of outdoor recreation each day in a small fenced area behind the block called a "kennel". Lower level men may exercise only in the corridors. Block 10 inmates are fed their meals on trays in their cells.

Minimum Security Blocks

Blocks A1 through A4 provide a total of 261 cells, 45 of them in A4, and 72 in each of the other three. A1, 2 and 3 have three tiers with 12 cells on each side, the central area of the block being called the "flats". The cells on the upper tiers open to catwalks leading to stairways for access to the flats. Each cell has a window. Most windows are unscreened, although the legislature has appropriated funds for the purchase of new screens. There are three showers per tier. Each cell has an electric light fixture with a hookup for other electrical appli-

ances. The inmates there are permitted to use their own personal clothing, and weekly laundry service is provided. The inmates may maintain personal property, including radios and televisions. Cleanser, disinfectant, sponges, mops and brooms are provided for the inmates to clean their individual cells. The inmates dine in the institution dining hall. After supper they have an open period when they may pursue recreation, programs, avocation or other activities. They are locked in their cells at 9:30 p.m. for the evening count. Each prisoner in this section has a job assignment, many of them working in the prisoner industries area, in the manufacture of metal products, brushes and brooms, or in the printing shop. Others work at janitorial or maintenance jobs throughout the prison or at clerical jobs.

Cellblocks B6 and B7 contain a total of 90 cells. They are used for housing new arrivals. The average stay in B6 or B7 is approximately 60 days. Men are thereafter transferred to MCI Norfolk for classification and a permanent institution assignment. About 15% of them return to Walpole; the others being assigned to other institutions.

Idleness

There is idleness, as claimed by the plaintiffs, at Walpole. The extent of it depends upon the area in which an inmate is located. In the maximum security blocks inmates are not permitted to work. These men are the most disruptive prisoners in the correctional system. Four inmates in each block act as runners cleaning the block. As previously recited, the men in the lower tiers of Block 10 are not permitted any exercise, and the men in the upper tiers are allowed one hour of outdoor recreation each day. The men are locked in their cells from 9:30 p.m. to 7:00 a.m. and, when a major count occurs. In Blocks B1 through B4, meals are taken in the flats, and men ordinarily leave the blocks for no more than three visits per week in the B-section visiting room, attorney visits which are unlimited, counseling sessions, program activities, limited work

assignments, administrative hearings, medical appointments, trips to outside hospitals, court trips, law library sessions and religious services. In these Blocks B1 through B4 there are daily periods in the outdoor recreation yard and there are limited indoor recreation facilities. These men do not participate in the industries program. In the A section, however, educational programs are available. The men in the protective custody blocks, A6 and B9, and in the New Man's section obviously require strict security conditions for protective purposes, but their stay is limited. During that time, in A6, there is access to programs and job opportunities. Correspondence privileges, access to medical care, attorney access and the right to use the law library are comparable to other A section inmates. In B9 visiting privileges are allowed and the men have their own recreation areas indoors and outdoors. Correspondence, medical care, attorney access and library rights are provided. So far as the New Man's section is concerned, no man may presently be placed there against his will.

I am not persuaded, and therefore do not find, that the inmates at Walpole have been denied the right to a reasonable opportunity for exercise. Plaintiffs argue that inmates are subjected to long periods of total idleness which leads to anger, frustration and rebellion. The plaintiffs would have the court find that the periods of total idleness constituted a deliberate policy on the part of the defendants. I am not persuaded, and therefore do not find, that there was a deliberate idleness enforced upon the inmates in Block 10 in order to punish them. There is no doubt that idleness is a major problem. The situation at Walpole, however, with respect to this aspect of prison life, does not present a picture of constitutional violation. There are programs, work opportunities, avocational and recreational facilities, visiting, correspondence and personal property privileges. There is also a classification system which permits inmates, regardless of precious conduct, to earn their way to lower custody status and less idleness.

Sanitation, Health and Safety

Sanitation is obviously a problem at Walpole. The facilities there are used by large numbers of persons, not only the inmates, but hundreds of staff workers and large numbers of visitors. Sanitation will be a problem in any such institution and the degree of cleanliness achieved will depend upon the cooperation of the staff and the inmates.

Inmate runners are used in the cellblocks. Commonly, two runners will serve the flats area, one will serve the second tier and one will serve the third tier. These persons remove trash and debris, sweep floors and walls, and clean the showers. Each inmate is responsible for keeping his own room clean.

The most severe problems have most occurred in Blocks B1 through B4 and in Block 10. These areas have suffered from dirty conditions over extended periods of time. There has been an accumulation of filth reaching ceiling level, thoroughly encrusted (language suggested by counsel for plaintiffs), admittedly caused by the inmates themselves throwing paper, debris, food, liquids, feces and urine on the floors and walls of the cellblocks. Serving meals in the blocks, necessitated by security, adds to the problem. The garbage attracts cockroaches and mice. On occasion, and particularly during lockup, runners have refused to work, and the prison staff has swept and mopped the blocks. Such efforts have frequently been for nought, since the inmates, with the garbage from their next meal, served in the cells by the correction officers, is available to recreate the sanitary problem quickly. In some instances normal conditions have been restored within a few days, but lockups have also lasted better than a month.

One Howard Wensley, a sanitary inspector, conducted inspections at Walpole once or twice a year, since 1972. He wrote reports and sent them to prison officials. His reports, Exhibits 24 through 35, indicate many sanitary code violations. The evidence also discloses correction of many of these, such as fire damage in 1973, the operation of an unsanitary

landfill, a lack of smoke detectors, leaks in the dining room, broken windows in the bakery, dirty trash barrels and leaky slop sinks. He described the absence of electrical outlets and the rigging of makeshift wiring for appliances, such as lamps and radios. He told of ventilation and heating problems. He spoke of slime on walls and plumbing fixtures, sewage backups, and the clogging of drains in showers. He characterized Walpole as "unfit for human habitation" by reason of sanitation problems. He said that diseases, such as Salmonella, Shigella and Typhoid might spread. On the other hand, there was the testimony of Dr. Ronald I. Goldberg who testified that there is virtually no possibility of an outbreak of any of those diseases, and there was no evidence of any such a case having occurred at Walpole. As defendants have argued, there was not an instance of disease of any kind, illness, accident or injury, attributable to code violations.

William Babineau, a Department of Public Health Inspector of food service establishments, described the sanitary conditions at Walpole in the food service areas as "average" and as not hazardous to health. Mr. Wensley's opinion concerning the pest problem was in contrast to that of Lewis Wells of the Massachusetts Pest Control Board and that of Robert Verville, an exterminator who had serviced Walpole on a weekly basis for a year prior to the trial. I conclude that the sanitary conditions at Walpole leave a great deal to be desired; that, however, they are not shocking or barbarous and do not transgress the Constitutional standard. The problems of which complaint was made were created by the plaintiff class, in large measure.

There was conflicting testimony concerning the quality of the food at Walpole. It travels a distance from the preparation area to the blocks where it is served. Only minimum section inmates and new men eat in the main dining room. There have been legitimate complaints concerning conditions in the food preparation area: complaints concerning the lack of window

screens, broken windows, broken or leaking equipment, flaking paint, pooling of water on the floor, and a leaking roof. During 1979 certain foods were embargoed by reason of taint by rodent droppings. It appears, however, that efforts have been made to correct problems drawn to the attention of the institutional staff. The witness Babineau characterized sanitation in the food service area as "average". A new dishwasher was installed in 1979 at a cost of $30,000; repairs were completed in the roof in 1978; and the Corrections Department obtained $350,000 for the fiscal year 1980 to replace worn kitchen equipment. Walpole has had a pest control service under contract for years and spraying equipment is available with insecticide to cope with the problem. I accept the testimony of Mr. Verville who stated that the infestation problem is comparable to that in other large food service establishments.

There is no question that the heating and ventilation system has faults. Senator Jack Backman testified that, in the middle of winter, he had seen inmates on a top tier in their underwear, while inmates on the flats were dressed in shirt and pants, socks and shoes. There has been a capital outlay appropriation exceeding half a million dollars to make improvements in the ventilation system at Walpole.

I have considered all of the testimony presented to the court and jury, including that of the dietician, concerning the guidance given to the steward at Walpole, concerning medically prescribed diets; I have considered the quality of the food and produce as described by the steward. I have, in brief, taken into account all of the testimony that I consider to be worthy of credibility, cogent and trustworthy. I have not neglected the reports by the witness Wensley concerning sanitary code violations consisting of torn or damaged bedding material. It appears that Walpole has replaced its fire retardant foam mattresses. They would give off toxic fumes if exposed to open flame. The bed clothing stock is, apparently, maintained at a proper level.

With respect to the safety of the inmates, some seven years ago the electronic gang-locking system in Blocks A1 through A3 was destroyed by inmates. Each cell in those blocks must be unlocked individually. From the testimony that the Corrections Department has "in progress" a capital outlay appropriation and contract to repair this system, and in the light of the fact that the inmates in those blocks are locked in only a few hours per day, I am content that there is no Constitutional violation in this regard. Medical services appear to be adequate.

In summary, the plaintiffs have failed to establish by a fair preponderance of the credible evidence that the inmates at Walpole have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, in the blocks, in the New Man's section, or by reason of conditions in the kitchen area. The conditions complained of were created by the plaintiffs' own conduct in the cellblocks.

CONCLUSIONS

This court has jurisdiction of this matter pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a), 1343(3) and (4). The plaintiffs in these actions adequately represent the class of prisoners in Walpole and are entitled to maintain this class action. Each of the named defendants was an agent of the Commonwealth of Massachusetts, and the actions of these persons constituted acts under color of state law as that phrase is used in 42 U.S.C. § 1983. The prisoners confined in Walpole retained their Constitutional rights, except those which are in conflict with the security and rehabilitative goals of the prison system. Punishment may be so below civilized norms or so inconsistent with the basic dignity of man as to be cruel and unusual no matter what its provocation; or it may be cruel and unusual because extremely disproportionate to the occasion. *See Estelle* v. *Gamble*, 429 U.S. 97 (1977). *See also O'Brien* v. *Moriarity*, 489 F.2d 941 (1st Cir. 1974). The conditions of confinement of the inmates at Walpole are not

barbarous to the extent that they offend society's evolving sense of decency. *Nadeau* v. *Helgemoe*, 561 F.2d 411 (1st Cir. 1977). The sanitation problem in the cellblocks was created by the plaintiffs themselves. Having concluded that the plaintiffs have not proved violation of Eighth Amendment rights, judgment shall be entered in favor of the defendants. Having found no violation of the prisoners' Constitutional rights, by reason of single complaints, or by way of the totality of conditions, the relief sought by the plaintiffs must be denied, even apart from the jury verdict (a general verdict in favor of all three defendants on the damage claims).

s/ JOHN J. MCNAUGHT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES CONSTITUTION, AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

UNITED STATES CONSTITUTION, AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

TITLE 42, UNITED STATES CODE, § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Opposition

RECEIVED
APR 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 81-1730

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

FRANK A. HALL, et al.,
Petitioners

v.

ALBERT BLAKE, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANN LAMBERT GREENBLATT
COUNSEL OF RECORD
Massachusetts Correctional Legal Services, Inc.
294 Washington Street, Room 744
Boston, Massachusetts 02108
(617) 482-2773

JUDITH A. STALUS
Massachusetts Correctional Legal Services, Inc.
294 Washington Street, Room 744
Boston, Massachusetts 02108
(617) 482-2773

MICHAEL AVERY
2 Park Square
Boston, Massachusetts 02116
(617) 426-2020

NORMAN S. ZALKIND
65A Atlantic Avenue
Boston, Massachusetts 02110
(617) 742-6020

COUNSEL FOR RESPONDENTS

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Constitutional Provisions Involved	1
Statement of the Case	1
Argument	2
Conclusion	6
Certificate of Service	7

TABLE OF AUTHORITIES

	Page(s)
DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978), cert. denied, 493 U.S. 927 (1978).....	5
Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), aff'd 501 F.2d 1291 (5th Cir. 1974).....	4, 5
Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971).....	4
Hutto v. Finney, 437 U.S. 678 (1978).....	4
Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (1st Cir. 1979), cert. denied, 419 U.S. 977 (1974).....	5
Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).....	5
Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).....	5
Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978), aff'd in part sub nom. Inmates of Alleghany County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979).....	4
Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff'd sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).....	4
Ramos v. Lamb, 485 F. Supp. 122 (D. Col. 1979), aff'd 639 F.2d 559 (10th Cir. 1980).....	4
Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972).....	5
Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978).....	4

Opinions Below

The respondents adopt the statement of the petitioners and direct the Court's attention to the texts of the opinions included in the appendix of the petition.

Jurisdiction

The respondents adopt the statement of the petitioners.

Questions Presented

Respondents adopt the statement of the petitioners, with regard to the first question presented, but deny that petitioners' statement of the second question is an accurate reflection of the ruling of the Court of Appeals, which did not hold that "conduct of plaintiff prisoners in sabotaging their living quarters [must] be disregarded in determining whether conditions thus created denied them rights under the Eighth Amendment." (See A-9-10 of Petition, opinion of Court of Appeals.)

Constitutional Provisions Involved

The respondents adopt the statement of the petitioners.

Statement of the Case

This case was brought by inmates at the Massachusetts Correctional Institution at Walpole to challenge the constitutionality of the conditions of their confinement. The damages part of the case was tried to a jury which returned a verdict of no liability as to each individual defendant. Later the district court issued findings of fact and conclusions of law denying the inmates' claims for injunctive relief.

The inmates appealed. Citing certain ambiguities in the trial court's opinion, the First Circuit Court of Appeals remanded the case to the district court for further deliberation.

The prison administration then petitioned this Court for a writ of certiorari. They have not, however, moved for a stay of the Court of Appeals judgment. The case is presently active in the district court.

Argument

The Court of Appeals has remanded this case to the trial judge for clarification of his opinion. Review of the decision to remand by this Court, while proceedings continue in the District Court, would clearly be premature.

The Appeals Court has not formulated a final rule for review of Eighth Amendment claims. The Appeals Court judges were unable to determine from the lower court decision whether inmate contribution to unconstitutional conditions was given improper consideration by the trial judge. Their decision does not bar all con-

sideration of inmate misbehavior as a defense. Identifiable inmates who actually create unconstitutional conditions may be barred from seeking equitable relief. The court has only held that well-behaved inmates may not be subjected to cruel and unusual punishment because of other prisoners' misbehavior. Responsibility for maintaining acceptable conditions and curbing recalcitrant inmates lies with prison administrators not inmates.

The district court has not yet had an opportunity to apply this general principle to the specific facts of the case nor has the Court of Appeals had an opportunity to review the guideline's application. Review by this Court of such an unripened issue is clearly inappropriate.

The Court of Appeals has remanded the case for further proceedings concerning the District Court's reliance on certain factors in making his rulings of law and, too, concerning current conditions in one section of the prison. So long as these issues remain unresolved and no final decree has been entered, the case is not ripe for review in this Court.

Further, petitioners have made no showing that the issues on which they seek review -- the use of inmate misbehavior as a defense in prison conditions litigation -- is actually a substantial issue facing the federal courts which need this Court's guidance. They point to some 8000 pending prisoner cases but do not point to a single case in which such a defense has been recognized. In fact, federal courts have consistently ordered injunctive relief when faced with unconstitutional conditions regardless of inmate involvement in creation of those conditions. Hutto v.

Finney, 437 U.S. 678, 688 (1978); Ramos v. Lamb, 485 F. Supp. 122, 135 (D. Col. 1979), aff'd 639 F.2d 559 (10th Cir. 1980); Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978), aff'd in part sub nom. Inmates of Alleghany County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979); Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978); Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), aff'd sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972), aff'd 501 F.2d 1291 (5th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971).

The Appeals Court decision is not in conflict with any decisions of this Court or with the right of trial by jury. The district court carefully protected the right to trial by jury by submitting the case to the jury prior to making any findings as to equitable issues. The jury was instructed to return a general verdict unless they found liability as to any given defendant. Only then were they to answer specific questions regarding the constitutionality of various areas of confinement in Walpole.

As the Court of Appeals correctly observed, it is impossible to determine from the general verdict whether it was based on a finding that the conditions at Walpole were not in violation of the Eighth Amendment or on findings that conditions were in violation of the Eighth Amendment, but that they were not the product of intentional or reckless misconduct by the individual defendants or were caused by some agency other than the defendants (e.g., the state legislature, the inmates, etc.).

Petitioners' argument that proof of liability is identical for money damages and equitable relief is patently wrong.* A state official will often have responsibility for remedying unconstitutional conditions which are not of his doing. A showing of good faith or best efforts by state officials may shield them from liability in damages but cannot protect them from injunctive orders. Intentional or reckless misconduct is clearly not a requisite for establishing an equitable claim. DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978), cert. denied, 493 U.S. 927 (1978); Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (1st Cir. 1979), cert. denied, 419 U.S. 977 (1974); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

---

* Rule 25(d) of the Federal Rules of Civil Procedure, for example, requires automatic substitution of successive public officers being sued in their official capacity. Obviously, a substituted party would not assume his predecessor's liability in money damages.

Conclusion

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari. The decision of the First Circuit Court of Appeals is in accord with all decisions of this Court and other federal courts which have considered similar issues. Moreover, the present petition is underripe.

Respectfully submitted,

Ann Lambert Greenblatt
Counsel of Record
Massachusetts Correctional
Legal Services, Inc.
294 Washington Street, Room 744
Boston, Massachusetts 02108
(617) 482-2773

Judith A. Stalus
Massachusetts Correctional
Legal Services, Inc.
294 Washington Street
Boston, Massachusetts 02108
(617) 482-2773

Michael Avery
2 Park Square
Boston, Massachusetts 02116
(617) 426-2020

Norman S. Zalkind
65A Atlantic Avenue
Boston, Massachusetts 02110
(617) 742-6020

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Ann Lambert Greenblatt, hereby certify that I have served the foregoing Opposition to Petition for Writ of Certiorari upon the petitioners by forwarding a copy through the office of their counsel Lee Carl Bromberg, 31 Milk Street, Boston, Massachusetts 02109 by United States Mail, first class postage prepaid, this 14th day of April, 1982.

Ann Lambert Greenblatt

IN THE SUPREME COURT OF THE UNITED STATES

APR 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FRANK A. HALL, et al.,
Petitioners

v. NO. 81-1730

ALBERT BLAKE, et al.,
Respondents

RESPONDENTS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents Albert Blake, Ralph Hamm and Patrick Rahilly, through their attorney, respectfully move the Court, pursuant to Rule 46 of the Rules of the United States Supreme Court, for leave to proceed in forma pauperis. Respondents are named representatives of the class of prisoners housed at the Massachusetts Correctional Institution at Walpole certified by the district court. Respondents did seek, and were granted, leave to proceed in forma pauperis in the district court and continued to proceed in forma pauperis in the First Circuit Court of Appeals, pursuant to Rule 24 of the Federal Rules of Appellate Procedure.

For the foregoing reasons, respondents respectfully request that their motion be allowed.

Respectfully submitted,

Ann Lambert Greenblatt
Counsel for Respondents
Massachusetts Correctional
Legal Services, Inc.
294 Washington Street, Room 744
Boston, Massachusetts 02108
(617) 482-2773

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

FRANK A. HALL, et al.,
Petitioners

v. NO. 81-1730

ALBERT BLAKE, et al.,
Respondents

AFFIDAVIT OF RALPH C. HAMM III

I, the above-named affiant, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Ralph C. Hammett III

SUBSCRIBED AND SWORN TO before me this 29 day of March 1982.

Arthur G. Gauthier
Notary Public

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

FRANK A. HALL, et al.,
Petitioners

v. NO. 81-1730

ALBERT BLAKE, et al.,
Respondents

AFFIDAVIT OF ALBERT BLAKE

I, the above-named affiant, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I Declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. 28 U.S.C. §1746 U.S.C. § 1621

Albert J. Blake, #39594-066
Box 1000 U.S. Penitentiary
Leavenworth, Kansas 66048

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 1982.

March 17, 1982

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

FRANK A. HALL, et al.,
Petitioners

v. NO. 81-1730

ALBERT BLAKE, et al.,
Respondents

AFFIDAVIT OF PATRICK RAHILLY

I, the above-named affiant, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Patrick Padelt

SUBSCRIBED AND SWORN TO before me this 26 day of March, 1982.

Arthur G. Gaither
Notary Public

RECEIVED
APR 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

FRANK A. HALL, et al.,
Petitioners

v. NO. 81-1730

ALBERT BLAKE, et al.,
Respondents

AFFIDAVIT

I, Ann Lambert Greenblatt, being duly cautioned and sworn, depose and say:

1. I am counsel of record for the respondents in the above-captioned case.

2. I am a member of the Bar of this Court.

3. This affidavit is prepared pursuant to Rule 28.2, Rules of the United States Supreme Court.

4. I personally mailed an original and one copy of the Brief in Opposition to Petition for Certiorari with accompanying documents to the Clerk of Court, United States Supreme Court, One First Street, Washington, D.C. 20543, first class postage prepaid, on April 14, 1982.

Ann Lambert Greenblatt

Sworn to before me and subscribed in my presence this 14th day of April, 1982.

Notary Public

My commission expires: January 9, 1987

CERTIFICATE OF SERVICE

I, Ann Lambert Greenblatt, hereby certify that I have served a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis upon the petitioners by forwarding a copy through the office of their counsel, Lee Carl Bromberg, 31 Milk Street, Boston, Massachusetts 02109, by United States Mail, first class postage prepaid, this 14th day of April, 1982.

Ann Lambert Greenblattt